shall be a misdemeanor punishable by a fine not to excess five hundred dollars or by imprisonment for a period not exceeding one year, or by both. (as amended and renumbered by L.L. 1950, No. 98, July 27—formerly §583.) • • •

"§583-d. Hospital Code.—a. The board of hospitals is hereby authorized and empowered to promulgate a hospital code and from time to time to add to and to alter, amend or repeal any part of such code. Such hospital code shall consist of such rules and regulations, not inconsistent with the constitution or the laws of this state or with this charter, as may be necessary to carry out the powers and duties vested by law in the department of hospitals and the board of hospitals. • • • "

## The Regulations Involved

For the convenience of the Court, the pertinent rules, both the old as well as the new, dealing with bed capacity required in private proprietary hospitals, are quoted herewith:

1) Old Rules Provided By The Regulations Governing The Establishment And Maintenance Of Private Proprietary Hospitals, Promulgated By The Department Of Hospitals, And In Effect For Approximately 25 Years And Until October 1, 1956:

*As to bed capacity:*

*Article II of Regulations:*

"The application shall indicate the number of patient beds that will be placed on each floor and the total bed capacity of the hospital. Should the hospital desire to increase the bed capacity it will be necessary to apply for an amended permit."

*Article V (f)*

"(f) Rooms and Wards: All rooms to be occupied by patients shall open directly to the external air, with suitable windows for light and ventilation. All beds used for patients shall be at least three feet apart where arranged in series and at least two feet from lateral adjoining walls."

. . . . . .

2) New Rules Provided By The New Hospital Code (Article III) Promulgated By The Board Of Hospitals For The Establishment And Maintenance Of Private Proprietary Hospitals And In Effect Since October 1, 1956:

*As to bed capacity:*

*Section 56(4):*

"Floor Space and Physical Facilities.

(a) The floor area of each single private room in hospitals which have never been licensed prior to October 1, 1956, shall be at least one hundred (100) square feet. Each single room in institutions which have been licensed prior to October 1, 1956, shall have a floor area of at least seventy (70) square feet.

(b) Each bed in other than single private rooms shall have a floor area of at least seventy (70) square feet and shall be separated from any other bed by at least three (3) feet and from lateral adjoining walls by at least two (2) feet.

(c) In rooms housing more than one (1) patient, equipment shall be provided which shall permit privacy to each patient when indicated."

. . . . . .

## Manner in Which Federal Questions Sought to Be Reviewed Were First Raised

The federal questions now sought to be reviewed were first raised in the Court of first instance in the pleadings, to with the petition herein in paragraphs designated "55" and "59" therein wherein petitioner alleged.

> "55. That the discriminatory provisions of the new Hospital Code and Regulations, as well as the due process clauses of the State and Federal Constitutions, particularly as affecting private proprietary hospitals, including the Parkchester General Hospital, which were constructed and had their bed capacity, per room built in accordance with lawful authorization, require a review and annulment of the respondent's determination" (113, 114).*
>
> "59. That petitioner verily believes, and was so informed by counsel, that the determination made by the respondent is arbitrary, capricious, unreasonable and contrary to the law and is in plain violation of petitioner's constitutional rights, both under the State as well as the Federal Constitution and is violative of the provisions of the New York City Charter" (118).

The Court of first instance, Special Term, Part 1 of the Supreme Court of the State of New York, by its order dated June 20, 1958 wherein petitioner's application was denied (16-20) in effect held Section 56, Subd. 4(b) of the Amended Hospital Code and Regulations to be constitutional.

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* Numerals in parentheses refer to folios of the printed record on appeal to the Court of Appeals of the State of New York unless otherwise designated.

The federal questions now sought to be reviewed were again raised in the intermediate Appellate Court, the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, by petitioner's notice of appeal to said Court (13-15) which brought up for review the questions raised in the lower Court and in petitioner's brief on appeal to said intermediate Appellate Court which urged, among other things, the federal constitutional questions now sought to be reviewed.

The Appellate Division of the Supreme Court of the State of New York, First Judicial Department by its order of affirmance dated December 11, 1958 (610-615) in effect held Section 56, Subdivision 4 (b) of the Amended Hospital Code and Regulations to be constitutional.

The federal questions now sought to be reviewed were again raised in the court of last resort of the State of New York, the Court of Appeals of the State of New York, by petitioner's notice of appeal to said Court (598-609) which raised for review the specific constitutional questions.

By a divided opinion (See Exhibit A annexed hereto), the Court of Appeals of the State of New York by a divided Court found Section 56, Subdivision 4 (b) of the Amended Hospital Code and Regulations to be constitutional.

## ARGUMENT RELIED ON FOR ALLOWANCE OF WRIT

**A. The new Hospital Code is unreasonably discriminatory against private proprietary hospitals and thus denies petitioner who is the owner and operator of a private proprietary hospital, equal protection of the law and his right as a citizen to pursue a lawful trade or business, which rights are guaranteed petitioner under the Constitution of the United States.**

It is not denied that the limitations as to bed capacity as provided by Article III, Section 56(4) *are limited to private proprietary hospitals*, which provide 20% of the hospital care for paying patients in the City of New York and *do not apply* to voluntary hospitals or City hospitals, maintained and operated by respondent, which provide the bulk or 80% of such care.

Petitioner contends that his constitutional rights guaranteed by the Fourteenth Amendment of the Constitution of the United States are being violated in that the Hospital Code, is applicable *only* to owners and or operators of private proprietary hospitals catering to a small percentage (20%) of the hospital needs of the paying patients in the City of New York, while the operators of voluntary and City hospitals catering to 80% of such needs are not so affected, that it abridges the privileges of petitioner and denies him equal protection of the law.

The leading case on the subject, which in our opinion fully supports the petitioner's contention, is that of *The New York Sanitary Utilization Co.* v. *The Department of Public Health of New York*, 32 Misc. 577; aff'd 61 App. Div. 106, decided by the Supreme Court, New York Special Term, October 1900. While the case is an old one, it has been steadfastly adhered to and cited with approval repeatedly, as it represents sound law which applies

equally today as it did 58 years ago. The statute there attacked was Chapter 663 of the Laws of 1900, which was an act to amend Section 1212, Chapter 378 of the Laws of 1897, known as the Greater New York Charter. The amended act contained the following provision:

> "It shall not be lawful for any person or persons incorporated or unincorporated or any corporation or corporations, to carry on, establish, prosecute or continue, within the borough of Brooklyn, the occupation or trade or business of rendering or treating with steam or boiling garbage, swill or offal."

Plaintiff attacked the statute on several grounds, one of them being that it deprived it, as well as all other persons in the Borough of Brooklyn, of the right and privilege secured to *all* citizens of this State to pursue a lawful trade and business.

The Court in sustaining that ground, said *inter alia* at page 581:

> "The statute in question, while prohibiting the carrying on, or the continuance of such trade or business in the borough of Brooklyn, impliedly permits it to be carried on in any of the other boroughs of Greater New York.
>
> Under these circumstances the statute is obnoxious to the criticism that it is arbitrary, unreasonable, and was not an act in the interest of the public generally; that is to say, the public of Greater New York."

How pertinent is the reasoning of the Court in the above case to the underlying principle in the instant proceeding? Here we have regulations requiring enlarged

floor areas per bed, none of which were required in Regulations in effect prior to October 1, 1956, and these regulations apply *only* to a small segment of the hospital field, while the bulk of the hospital field in the City of New York catering to 80% of the needs of New York City, insofar as paying hospital patients are concerned, is not burdened by such requirements. *It is therefore not an act in the interest of the public generally.*

Nor can the respondent claim that these regulations are justified under the doctrine of police powers. Again we are confronted with the fact that this so-called "police power" is being exercised in the case of a small segment of the hospital care field.

Police power exercised by a sovereignty has been defined in the case of *People ex rel. Wineburgh Advertising Co. v. Murphy*, 129 App. Div. 260, aff'd 195 N. Y. 126 (at pages 262-3), where the Court stated:

> "There are certain general and well-settled rules, however, which, if observed, will greatly aid in determining whether or not the police power of the State has been exceeded in any particular case. '*The power must be exercised subject to the provisions of both the Federal and State Constitutions, and the laws passed in the exercise of such power must tend, in a degree that is perceptible and clear, toward the preservation of the public safety, or the lives, health and morals of our inhabitants, or the welfare of the community.* But the Legislature cannot arbitrarily infringe upon the liberty or property rights of any person living under the Constitution, nor prevent him from adopting and following any lawful profession, trade or industrial pursuit, not injurious to the community, that he may see fit; nor prevent him from making contracts with reference

thereto. To justify the State in interposing its authority in behalf of the public, it must appear that the (interests) *of the public generally, as distinguished from those of a particular class*, require such interference and that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The Legislative determination as to what is a proper exercise of the police power is subject to the supervision of the court, and in determining the validity of an act it is its duty to consider not only what has been done under the law in a particular instance, but what may be done under and by virtue of its authority.' (Fisher Co. v. Koods, 187 N. Y. 90). This epitome of the rules surrounding and limiting the exercise of the police power finds support in a great number of cases in the courts of this and other States and of the United States. As we took occasion to say in City of New York v. Wineburgh Advertising Co. (122 App. Div. 748): 'To justify an act or ordinance which in any degree interferes with the liberty of the individual, or with the full enjoyment by him of his property, it must appear by reasonable intendment that it is calculated, intended, convenient and appropriate to conserve the public health, welfare, comfort or morals, and while it lies primarily within the discretion of the enacting body to determine what laws are appropriate and proper for that purpose, *yet the duty remains in the courts, when called upon, to scrutinize the measures sought to be enforced to see whether they really fall within*

*the limitations of the police power.* (Matter of Jacobs, 98 N. Y. 98.)'" (Emphasis supplied.)

See also:

*Health Department* v. *Rector*, 145 N. Y. 32.

In effect the "police power" as may be claimed here is merely a sham or smoke screen in an attempt to justify a patently unconstitutional municipal regulation. The Courts will look around the title to see in fact what the purpose and result of the regulation are.

The above reasoning and conclusions support the contention of the appellant that the Hospital Code and Regulations, by its limited application to private proprietary hospitals violates appellant's rights under the Fourteenth Amendment of the Constitution of the United States in that it abridges his privileges and denies him equal protion of the law.

**B. The new Hospital Code deprives petitioner of his property without due process of law in violation of his rights guaranteed under the Constitution of the United States.**

The uncontradicted facts in this proceeding as alleged in the petition are; that petitioner until January 3, 1957, and for 16 years prior thereto, operated the said hospital lawfully; that the Regulations in effect until October 1, 1956, did not require a floor area of 70 square feet for one bed; that the bed capacity allowed to petitioner in accordance with the licenses previously issued to him, the last one in effect until January 3, 1957, was 130 beds; that he is now required to reduce that capacity to 100 beds; that because of his failure to comply, he is directed to discontinue the operation of the said hospital, which represents an investment of upwards of $1,500,000.00;

and that he faces a criminal charge of operating the hospital without a license because of his failure to comply with the provisions of the Code and the directive to discontinue the operation of the said hospital. (Sec. 66 of Hospital Code and Sec. 583-e of New York City Charter.)

Petitioner contends that his constitutional rights guaranteed to him by the Fourteenth Amendment of the Constitution of the United States are violated in that he is threatened with the loss of his liberty and property without due process of law.

Again we respectfully refer this Court to the leading case of *N. Y. S. U. Co.* v. *Department of Public Health*, 32 Misc. 577, 583; aff'd 61 App. Div. 106, cited in Point I of this brief. There the Court said *inter alia* on pages 582, 583:

> "Second. Said statute also violates some of the above-mentioned constitutional provisions, because it deprives the plaintiff of its property without due process of law. * * *"
>
> "As above stated, the act in question requires the immediate discontinuance of said trade or business; and it contains no provision whatever for compensation to the plaintiff for the destruction of its plant, or for depriving it of the right to earn the compensation secured to it by said contract, for the performance thereof. *Moreover, it is well settled that an act of the Legislature is not due process of law.* It, therefore, follows that the objection that the act deprives the plaintiff of its property 'without due process of law' is well taken." (Emphasis supplied.)

See also *Arverne Bay Construction Co.* v. *Thatcher*, 278 N. Y. 222, where the Court of Appeals, at page 231, said:

"• • • *The legislative power of the State is, however, not plenary, but is limited by the Constitution of the United States and by the Constitution of the State. It may not take private property without compensation even for a public purpose and to advance the general welfare.* (Matter of Eaton v. Sweeney, 257 N. Y. 176.) 'The protection of private property in the fifth amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the fourteenth amendment. Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the constitution of the United States.' (Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415.)

In the prevailing opinion in that case, Mr. Justice Holmes pointed out that 'the general rule at least is, *that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking*' (p. 415). Whether a regulation does go too far is 'a question of degree—and therefore cannot be disposed of by general propositions,' and here Mr. Justice Holmes gave warning that 'we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change' • • •." (Emphasis supplied.)

Certainly in the instant proceeding, it is well demonstrated that the regulation, which compels petitioner to eliminate 30 beds from his hospital and thus reduce petitioner's ability to supply accommodations to 30 patients with the resultant loss of income to appellant of approximately 23% as heretofore allowed him by the Regulations in effect until October 1, 1956, and the further fact that voluntary and City hospitals are not similarly required to reduce their bed capacity, is in the language of the late Justice Holmes "a regulation which goes too far and it will be recognized as a taking."

It, therefore, follows, that the objection that the Hospital Code deprives the appellant of his property and threatens him with the loss of his liberty without due process of law, is well taken and the said Code, specifically the regulations thereof concerning bed capacity, should be nullified and declared unconstitutional by this Court.

**C. Section 56, Subdivision 4(b) is repugnant to the Constitution of the United States as being an *ex post facto* law and a law impairing the obligation of a contract.**

The uncontradicted facts as alleged in the petition, show that respondent contends that petitioner is bound by the provisions of the New York Hospital Code and must reduce the bed capacity of the hospital from 130 to 100 beds, notwithstanding the fact, that the structural layout of the rooms in the said hospital, constructed in line with plans submitted to the Department of Hospitals and previously approved by it and in line with annual licenses previously issued to appellant since 1940, the last of which expired on January 3, 1957, allowed appellant a bed capacity of 130 beds or approximately 23% more than is now permitted by the Hospital Code.

Respondent apparently realizes that the Board of Hospitals has no power to deprive persons owning and/or operating private proprietary hospitals of their property rights without due process of law. The Board in fact, distinguishes in the new Code between property rights of hospital owners licensed prior to October 1, 1956, who had their room-layouts constructed in accordance with previous lawful authorization (which allowed floor area per bed of less than required under the new Hospital Code) and those of owners of new hospitals to be opened and licensed since October 1, 1956, as evident by the following language in Section 56(4), Subdivision (a):

> "The floor area of each single private room in hospitals *which have never been licensed prior to October 1, 1956*, shall be at least one hundred (100) square feet. Each single room in institutions *which have been licensed prior to October 1, 1956*, shall have a floor area of at least seventy (70) square feet." (Emphasis supplied.)

For reasons however not explained, respondent failed to make this distinction in Subdivision (b) of the Section, which reads as follows:

> "(b) Each bed in other than single private rooms shall have a floor area of at least seventy (70) square feet and shall be separated from any other bed by at least three (3) feet and from lateral adjoining walls by at least two (2) feet."

In any event, there would be no logic to recognize the special situation of hospitals licensed prior to October 1, 1956, by allowing them a variance of 30 square feet per bed in single rooms, and disregard completely the same situation concerning floor area in rooms other than single, which if followed through, would have allowed appellant a floor area of 40 square feet per bed in such rooms.

It is quite apparent that for reasons best known to itself the Board of Hospitals chose to attempt to impose impossible conditions upon the owners of private proprietary hospitals with regards to beds in other than single private rooms (as provided in §56, Subd. b of the new Hospital Code). While the respondent in the present case and as he does in all cases attacking his rules and regulations is prone to confuse the issue with the claim of police power and protection of public health, there is no such justification of the regulations being attacked in this case, especially in view of the fact that the City's own hospitals are not encumbered by similar regulations. Certainly there should be no difference in the standard for protection of the public health as practiced in City hospitals and in other voluntary hospitals from the standard established for private proprietary hospitals. Certainly whether a hospital is operated for profit or not, the same standard for the protection of the public health should be imposed as to all equally.

It is to be noted that the Hospital Code in Section 41(4) thereof, provides that "*new institutions, under construction prior to October 1, 1956*, whose plans have been approved by the Department of Buildings and the Commissioner of Hospitals (the respondent herein), shall be subject only to those building requirements which are applicable to institutions *which were in existence and licensed prior to that date*". This very provision in the Hospital Code confirms petitioner's contention that the Hospital Code must protect petitioner's constitutional rights. Certainly if the property rights of *new institutions under construction prior to October 1, 1956* are protected by Section 41(4) of the Code, old institutions already built and in operation under licenses issued prior to October 1, 1956, are equally entitled to the protection of their licensees' property rights and should not be deprived of their properties without due process of law.

The determination of the respondent based upon Section 56(4)(b) of the New Hospital Code which ignores these rights and directs petitioner to close the hospital and thus jeopardize an investment of upwards of $1,500,000.00 and further threatens petitioner with the loss of his liberty, is contrary to law and is based on an attempt to enforce a regulation "not consistent with the Constitution and laws of this State". And it is also violative of Section 10 of Article 1 of the Constitution of the United States which forbids, among other things, the passage of *ex post facto* laws and laws impairing the obligation of a contract.

## CONCLUSION

**The petition for a writ of certiorari should be granted and this Court in the exercise of its powers should declare Section 56, Subdivision 4(b) of the Hospital Code of the City of New York, unconstitutional.**

Respectfully submitted,

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## EXHIBIT A

5 New York Reports, 2d Series (pp. 370-380)

In the Matter of Charles L. Engelsher, as Director, Owner and Licensee of Parkchester General Hospital, Appellant, against Morris A. Jacobs, as Commissioner of Hospitals of the City of New York and as Chairman of the Board of Hospitals of the City of New York, Respondent.

Argued January 7, 1959; decided March 13, 1959.

Hospitals—private proprietary hospital—regulation—Board of Hospitals of City of New York properly refused to issue petitioner license permitting operation of private proprietary hospital on ground that he had not complied with New York City Hospital Code effective October 1, 1956—new regulations, changing required minimum floor area per bed and providing for increase in nursing staff do not consttiute unreasonable discrimination and do not violate due process provisions of State and Federal Constitutions (U. S. Const., 14th Amdt.; N. Y. Const., art I, § 6)—hospital's compliance with superseded regulations does not prevent exercise of police power—minimum space requirements not unreasonable as matter of law.

1. The Board of Hospitals of the City of New York properly refused to issue petitioner a license permitting him to operate a private proprietary hospital on the ground that he had not complied with new regulations of the New York City Hospital Code, which became effective on October 1, 1956.

2. The regulations changed the required minimum floor area per bed and also required an increase in the nursing staff for such hospitals. These new regulations do not

constitute an unreasonable discrimination and do not violate the due process provisions of the State and Federal Constitutions (U. S. Cont., 14th Amdt.; N. Y. Const., art 1, § 6). The fact that the regulations do not apply equally to municipal hospitals and voluntary nonprofit hospitals is not an unreasonable discrimination. The Legislature itself has established private proprietary hospitals in New York City in a separate class and has subjected them to special rules and regulations by the Board of Hospitals. The other institutions come under the close scrutiny of either the city or the State. Private hospitals, without regulation, do not.

3. Under the regulations, all private proprietary hospitals are treated alike. Equal protection is accomplished when all of the same class are treated in a like manner.

4. Moreover, it is not shown whether there are any similar regulations in other statutes or rules applicable to city hospitals or voluntary hospitals.

5. The new hospital code, which reduces the bed capacity of the hospital, does not constitute an unlawful taking in violation of due process of law because the hospital had been conducted in compliance with the regulations in the superseded hospital code. Compliance with existing laws does not prevent the exercise of the police power.

6. The minimum space requirements are not unreasonable as a matter of law and the Board of Hospitals did not act in an arbitrary manner in refusing a license to petitioner under the regulations.

*Matter of Engelsher* v. *Jacobs*, 7 A. D. 2d 720, affirmed.

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First

Judicial Department, entered December 11, 1958, which unanimously affirmed an order of the Supreme Court at Special Term (SAUL S. STREIT, J.), entered in Bronx County, denying an application by petitioner to review and annul a determination of respondent which (1) denied an application by petitioner for variances from the provisions of the Hospital Code of the City of New York, (2) denied an application by petitioner for the renewal of a license, and (3) directed petitioner to discontinue operation of the hospital.

*Menahem Stim* and *Allen S. Stim* for appellant. I. The new hospital code is unreasonably discriminatory against private proprietary hospitals and thus denies appellant, who is the owner and operator of a private proprietary hospital, equal protection of the law and his right as a citizen to pursue a lawful trade or business, which rights are guaranteed appellant under the Constitutions of the United States and of the State of New York. (*New York Sanitary Utilization Co.* v. *Department of Health*, 32 Misc. 577, 61 App. Div. 106; *People ex rel. Wineburg Adv. Co.* v. *Murphy*, 129 App. Div. 260, 195 N. Y. 126; *Health Dept.* v. *Rector, Church Wardens & Vestrymen of Trinity Church*, 145 N. Y. 32.) II. The new hospital code deprives appellant of his property without due process of law in violation of his rights guaranteed under the Constitutions of the United States and of the State of New York. (*New York Sanitary Utilization Co.* v. *Department of Health*, 32 Misc. 577, 61 App. Div. 106; *Arverne Bay Constr. Co.* v. *Thatcher*, 278 N. Y. 222.) III. Section 56 (subd. 4, par. b) is repugnant to the Constitutions of the United States and of the State of New York as being an *ex post facto* law and a law impairing the obligation of a contract.

*Raymond Rubin* for Association of Private Hospitals, Inc., *amicus curiae*, in support of appellant's position.

I. The only issue before this court is whether or not the new standards as to area and nursing requirements of the code reasonably relate to the protection of patients' health and safety when such requirements are limited only to private patients with a choice of selection of hospital accommodations and are not applicable to city and voluntary hospitals where no such choice exists. (*Matter of Spielvogel* v. *Ford*, 1 N. Y. 2d 558.) II. The hospital code and specifically sections 48 and 56 (subd. 4, par. b) thereof are inconsistent with the Constitution of the State of New York, the Fourteenth Amendment to the Federal Constitution, the laws of the State of New York, and section 538-d of the New York City Charter, and are, therefore, unconstitutional.

*Charles H. Tenney, Corporation Counsel* (*Alfred Weinstein, Seymour B. Quel* and *Joseph Entel* of counsel), for respondent. It cannot be said that, regarding the need for regulation in the interest of public health, no reasonable basis can be conceived for distinguishing between hospitals operated for profit and those not operated for profit. Nor can it be said that the restrictions involved are not reasonably related to the protection of public health. Nor does the code make arbitrary distinctions in regard to the subject matter governed by it. (*Matter of Spielvogel* v. *Ford*, 1 N. Y. 2d 558; *Meiselman* v. *Crown Heights Hosp.*, 285 N. Y. 389; *Matter of 436 West 34th St. Corp.* v. *McGoldrick*, 288 N. Y. 346; *People ex rel. Bryant* v. *Zimmerman*, 241 N. Y. 405; *Queenside Hills Realty Co.* v. *Wilson*, 294 N. Y. 917, 328 U. S. 80.)

Burke, J. This article 78 proceeding was instituted by petitioner to compel the Board of Hospitals of the City of New York to issue to him a license permitting him to operate a private proprietary hospital. The board had denied the application since petitioner had not complied with new regulations of the New York City Hospital Code,

which became effective on October 1, 1956. This code superseded prior regulations, and was promulgated pursuant to subdivision 2 of section 583-a of the New York City Charter. The code made some changes in the rules and regulations governing the maintenance and operation of private proprietary hospitals. These regulations required that, in other than private rooms, each bed must have a floor area of 70 square feet. Insofar as private rooms were concerned, those hospitals licensed before 1956 were to have this same minimum floor area; those first licensed after the effective date of the new regulations were required to provide 100 square feet of floor area. The regulations also required an increase in the nursing staff for such hospitals.

Special Term denied petitioner's application to review and annul the determination of the board. This order was unanimously affirmed by the Appellate Division.

Petitioner claims that insofar as the new regulations require a minimum floor area for each bed, and an increase in the professional nursing staff, they not only constitute unreasonable discrimination, but also violate the due process provisions of the State and Federal Constitutions. (U. S. Const., 14th Amdt.; N. Y. Const., art I, § 6.) In regards to the equal protection argument, it is urged that since these regulations do not equally apply to municipal hospitals and voluntary non-profit hospitals, as well as private proprietary hospitals, there is unreasonable discrimination.

The police power of the State is the least limitable of all the powers of government. (*Block* v. *Hirsh*, 256 U. S. 135, 155; *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, 83.) "A legitimate public purpose may always be served without regard to the constitutional limitations of due process and equal protection". (*People* v. *Arlen Service Stations*,

284 N. Y. 340, 344; *People* v. *Perretta*, 253 N. Y. 305, 309; *People ex rel. Durham Realty Corp.* v. *La Fetra*, 230 N. Y. 429; *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63.)

It cannot be disputed that hospitals come directly within the ambit of the police power since they are institutions which directly deal with the health of the citzenry. Where the hospital has been instituted by some branch of the Government—bei t local or State—the hospital is already under the direct control of the Government. Such is the case, for example, with municipal hospitals in the City of New York. These hospitals are, under the New York City Charter, to be maintained and operated by the Department of Hospitals of that city (New York City Charter, § 583-a, subd. 1). Nonprofit voluntary institutions are not subject to the regulation of the Department of Hospitals (New York City Charter, § 583-a, subd. 2; see, e.g., Social Welfare Law, § 21; 1948 Atty. Gen. 247). It is only private proprietary hospitals which come within the licensing and regulatory power of the Department of Hospitals. The New York City Charter authorizes the Board of Hospitals to promulgate the necessary rules and regulations for private proprietary hospitals to promote the public health and welfare (New York City Charter, § 583-a, sub. 2). Thus, we can see that the Legislature itself, in respect to private proprietary hospitals in New York City, has established them in a separate class and has subjected them to special rules and regulations by the Board of Hospitals. It is easy to see why such a distinction was made. These other institutions come under the close scrutiny of either the city or the state; private hospitals, without regulation, do not (see *People ex rel. Wagner* v. *Hagan*, 52 App. Div. 387, 389).

Furthermore, while these regulations apply only in terms to private propriety hospitals, it is not shown and, indeed, the record is devoid of any evidence as to whether

there are any similar regulations in other statutes or rules applicable to city hospitals or voluntary hospitals.

Under the regulations in question, all private proprietary hospitals are treated alike. Equal protection is accomplished when all of the same class are treated in a like manner. (*Queenside Hills Co.* v. *Saxl*, *supra*.) That one class is treated differently than other classes can give rise to no complaint under the equal protection clause.

It is urged that the hospital in question was conducted in compliance with the regulations in the superseded hospital code, and the new hospital code which reduces the bed capacity of the hospital constitutes an unlawful taking, violating due process of law. The argument, in effect, is that petitioner has a "non-conforming use", which was exercised prior to the effective date of the new regulations, and, therefore, should be permitted to continue in effect as long as petitioner continues in business or chooses to operate under the former regulations. It is clearly settled that "In no case does the owner of property acquire immunity against the exercise of the police power because he constructed it in full compliance with existing laws". (*Queenside Hills Co.* v. *Saxl*, *supra*, p. 83; see, also, *Hadacheck* v. *Los Angeles*, 239 U. S. 394, 410; *Hutchinson* v. *Valdosta*, 227 U. S. 303.) If authority is needed for such a proposition in this State, *Health Dept.* v. *Rector, Church Wardens & Vestrymen of Trinity Church* (145 N. Y. 32, 43-44) will substantiate this position.

The only question then that we must consider in this case is the reasonableness of the regulations. There can be no doubt that they are calculated to promote the health and welfare of the public generally. *Health Dept.* v. *Rector, Church Wardens & Vestrymen of Trinity Church* (*supra*) suggests that the cost of expenditures incurred as a result of the legislation must be reasonable. Where

there are two or more beds in a room, the minimum space requirements can be readily met by the removal of one or more beds. Hence, the main loss here is the loss of future profit. We cannot say as a matter of law that the minimum space requirements are unreasonable as a matter of law, and hence it follows that the Board of Hospitals did not act in an arbitrary manner in refusing a license to petitioner under the regulations.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

VAN VOORHIS, J. (dissenting). The problems presented by this litigation have their origin in an amendment to the Hospital Code and Regulations promulgated by the New York City Board of Hospitals (§ 56, subd. 4), effective October 1, 1956, which enlarged the floor area required to be occupied by each bed in double rooms in a proprietary hospital, and added to the number of professional nurses required to be in attendance. Appellant claims to have complied with these nursing requirements, but objects to increasing the floor space to be occupied by each bed in other than single rooms from about 62.5 square feet, as formerly, to 70 square feet, as newly required. In adopting the new regulation, the Board of Hospitals took account of the fact that it would be difficult to reconstruct existing single rooms so as to enlarge the floor space, and therefore provided that each single room in institutions licensed before October 1, 1956 might continue to have a floor area of at least 70 square feet, whereas new hospitals, licensed after that date, would be required to have a minimum floor area of 100 square feet. When it came to other than single rooms, however, no corresponding dispensation was allowed in the case of existing structures. The new regulation directs that each bed in other than single private rooms shall have a floor area of at least

70 square feet. The problem introduced by this requirement is that there are numerous private rooms designed for two patients with a space area of 125 square feet. That allows 62.5 feet to each bed. Unless the hospital is rebuilt in these areas, the requirement that each bed shall occupy a space of at least 70 square feet would require removal of one of these beds, leaving an area of 125 square feet for the other bed. That would be much larger than any minimum requirement for existing or newly constructed single rooms. The consequence would be to reduce the authorized bed capacity of this hospital from 130 beds to 100 beds.

This hospital was constructed in 1929. It was bought by appellant in 1940, and has been operated by him since that date. Licenses for its operation have been issued annually by the city's Department of Hospitals. During the previous 25 years, no minimum floor area was prescribed for each bed, it being simply required that "All beds used for patients shall be at least three feet apart where arranged in series and at least two feet from lateral adjoining walls."

The petition to compel a renewal of appellant's hospital license has been denied on the ground that the new requirement of a minimum of 70 square feet to a bed has been validly imposed and has not been complied with. Appellant contends that this new regulation deprives him of his right to pursue a lawful trade or business in violation of the State and Federal Constitutions. The principal ground on which its validity is challenged is that the equal protection of the law is denied for the reason that this regulation applies exclusively to private proprietary hospitals which provide hospital care for but 20% of paying patients in New York City, as contrasted with 80% provided for paying patients by the voluntary or city hospitals which are not limited as to bed capacity. If 7.5

additional square feet are necessary for the proper care of patients in proprietary hospitals, so as to bring the bed area to 70 square feet, it is difficult to understand why the same considerations affecting public health should not also apply to the larger number of patients hospitalized in these other institutions, nor is there reason why they should not likewise be extended to the nonpaying patients in city and other hospitals. Although the reach of the police power is wide, it must be exercised evenly under the Federal and State Constitutions so as to bear upon all who are affected by it without discrimination (*New York Sanitary Utilization Co.* v. *Department of Health*, 32 Misc. 577, affd. 61 App. Div. 106). The police power must serve the interests of the public generally as distinguished from those of a particular class, must be related to the advancement of public health, safety or welfare and its exercise will be restrained where it has some other object although ostensibly directed to the furtherance of one of the above-mentioned purposes (*People ex rel. Wineburg Adv. Co.* v. *Murphy*, 129 App. Div. 260, affd. 195 N. Y. 126; *Health Dept.* v. *Rector, Church Wardens & Vestrymen of Trinity Church*, 145 N. Y. 32; *New York Sanitary Utilization Co.* v. *Department of Health*, *supra*).

Appellant asserts that private proprietary hospitals (the Association of Private Hospitals Inc., has filed as *amicus curiae* representing 37 member proprietary hospitals) are not regarded with favor by the City of New York and charges, in effect, that this and other harassments are designed to compel them eventually to cease operation. The city takes note of the unequal incidence of this regulation upon proprietary hospitals and attempts to meet the contentions by arguing that there is a basis for classification in that city hospitals and voluntary hospitals are not profit-making enterprises. The brief for the city states: "We argue that there is a rea-

sonable basis for distinguishing between profit-making enterprises such as petitioner's and those not operated for profit, on the ground that where the profit motive is involved there is a need for regulation to insure that the desire to increase income and cut expenses does not result in dangerous overcrowding and understaffing."

This argument is unusual and, in our view, unsound. Motive, we have been told in criminal cases, is not a basis for conviction, but is of evidentiary value in determining whether the accused has been guilty of the conduct which constitutes the crime (*People* v. *Seppi*, 221 N. Y. 62, 70; *People* v. *Giordano*, 213 N. Y. 575, 584). "Motive can never, of itself, prove guilt", as was said in *Giordano*, and, conversely, where the act has been committed that the law forbids, motive is unnecessary to be shown (*People* v. *Feigenbaum*, 148 N. Y. 636). According to the reasoning of respondent, if a voluntary or city hospital provides 62.5 square feet to a bed, that meets with approval for the reason that it is not operated for profit. A proprietary hospital which has done the same thing is condemned on the basis that it acted for gain and, therefore, from what is assumed to be a sordid motive. If a party is authorized or forbidden to do what he does, the reasons which prompted him are ordinarily unimportant. "The assignment of an improper motive or reason, for doing an act, which the municipality was authorized to perform could not make that act illegal." (*Chase-Hibbard Milling Co.* v. *City of Elmira*, 207 N. Y. 460, 467.)

If regulations like this are to be upheld or struck down according to the self-interest or degree of unselfishness of the actor, it would be necessary to consider the pecuniary interest of the doctors themselves in the voluntary or city hospitals, and to weigh the animating motives of the trustees or public officers who are responsible for their operation. The city hospitals and voluntary hospitals

are also under unremitting pressure to admit patients due to Blue Cross and Blue Shield Plans and other forms of hospital or medical insurance and due to the cost of building new hospitals. Lack of an adequate number of hospital beds and nursing attendants to fulfill the demand is well known. Hospitals everywhere are notoriously overcrowded. The point is not that reasonable regulations are unlawful to prevent overcrowding, but that institutions cannot be discriminated against on the theory that the same act is commendable if performed by one but reprehensible if done by another.

Neither is it an answer to the discriminatory operation of this regulation that the Board of Hospitals does not have jurisdiction over paying patients in voluntary hospitals. Section 583-b of the New York City Charter gives the Board of Hospitals jurisdiction over city hospitals as well as proprietary hospitals, and over voluntary hospitals to the extent that they care for the overflow from the city hospitals at city expense. The city hospitals not affected by these limitations have 19,899 beds according to the latest annual report of the Department of Hospitals (1957) against 4,548 beds for the proprietary hospitals. This is a sufficient indication of unlawful discrimination in this regulation, even if the voluntary hospitals were to be left out of account.

The regulation is sought to be justified as an exercise of the police power upon no ground except promotion of the public health. If the health of patients in proprietary hospitals is affected, then the health of patients in the other hospitals in the city must be neglected. They are subject to no such regulation. There is no rational basis for distinction on the ground of public health, which is the only ground on which the police power can be invoked in this case. The majority opinion states that there is no evidence that the voluntary and city hospitals are not subjected to similar restrictions regarding bed area. The

petition alleges that the other hospitals are free from these restrictions which are imposed on the proprietary hospitals alone. If the decision is to be based on lack of evidence of these facts which are alleged in the petition, then the petitioner-appellant should be allowed opportunity to prove them at a trial instead of being ordered summarily to discontinue the hospital.

Appellant is deprived of property—the right to follow his trade or profession—without due process of law as a result of this discriminatory, retroactive limitation on bed areas adopted without relation to the public health. This regulation distinguishes, as has been stated, between single rooms in hospitals licensed before and after October 1, 1956. It fails to distinguish between double rooms in hospitals licensed before and after that date. If it was proper, as it manifestly was, not to require the reconstruction of hospitals by enlarging the single rooms, the same principle could have been applied in case of the double rooms.

The order appealed from should not have directed appellant to discontinue operation of the hospital, which was equivalent to dismissal of the petition on the law. On the other hand, appellant is not entitled to an order in the nature of a peremptory mandamus compelling the issuance of the license if there are other violations on account of which the license renewal could have been refused. The answer of respondent also charges that this hospital is not staffed with registered nurses to the extent required by the regulations. These nursing regulations are not limited to proprietary hospitals, but call for compliance everywhere in the city with section 110 of the Sanitary Code which requires a registered professional nurse to be assigned to the labor and delivery rooms when a patient is in active labor and a registered professional nurse to be on duty in the nursery. Although appellant's

affidavit states that he has complied with the requirements of section 110 of the Sanitary Code and all of the other nursing obligations, the Commissioner of Hospitals has not confirmed this and his affidavit indicates deficiency in regard to these matters on prior inspection of the hospital. The Sanitary Code requirements are not discriminatory, inasmuch as they apply throughout the city. Appellant should have an opportunity to try before the Special Term the issue of whether the hospital does comply with the Sanitary Code as he avers that it now does.

The order appealed from should be modified by eliminating the direction to appellant to discontinue operation of Parkchester General Hospital and by remanding the matter to Special Term for a trial in the nature of an alternative mandamus, with costs to appellants to abide the event.

Chief Judge Conway and Judges Desmond, Dye and Fuld concur and Judge Burke; Judge Van Voorhis dissents in an opinion in which Judge Froessel concurs.

Order affirmed.